STATE OF CALIFORNIA
dca
DEPARTMENT OF CONSUMER AFFAIRS

STATE AND CONSUMER SERVICES AGENCY • ARNOLD SCHWARZENEGGER, GOVERNOR

CALIFORNIA ACUPUNCTURE BOARD
444 North 3rd Street, Suite 260, Sacramento, CA 95811
P (916) 445-3021 F (916) 445-3015 | www.acupuncture.ca.gov

MEMORANDUM

DATE	June 30, 2010
TO	ACUPUNCTURE BOARD MEMBERS
FROM	Janelle Wedge, Executive Officer Acupuncture Board
SUBJECT	**AGENDA ITEM 7i** – Discussion regarding Initiation of Rulemaking Package to Amend Regulations to Strengthen Board Enforcement Program Pursuant to the Department of Consumer Affairs Consumer Protection Enforcement Initiative (CPEI)

The Department of Consumer Affairs has been reviewing the text of SB 1111 to determine which of its applicable provisions may be implemented through regulation. Initial review indicates that many of the bill's provisions may be adopted as regulation.

The Department has requested the consideration of proposed regulatory changes be put on our meeting agenda. The SB 1111 proposed changes through regulation have been put on the meeting agenda for the board's consideration for authorizing the initiation of a rulemaking package to implement these provisions and are attached for your consideration.

The Legal Affairs Division has been working on specific boiler plate language that will be available to serve as a template for use as the board deems necessary. In addition, we have been informed that the legislative office is preparing a stock initial statement of reasons that each board and committee can work from.

SB 1111 Proposed Changes through Regulations

***NOTE: "Recommendation" is that which has been recommended by the Department.
"Proposed language" is that which is recommended by the Executive Officer.

1. **Board delegation to Executive Officer regarding stipulated settlements to revoke or surrender license:** Permit the Board to delegate to the Executive Officer the authority to adopt a "stipulated settlement" if an action to revoke a license has been filed and the licensee agrees to surrender the license, without requiring the Board to vote to adopt the settlement. **Recommendation: Amend regulations.**

   Proposed language: Amend section 1399.405 to read as follows:

   1399.405. Delegation of Functions.

   Except for those powers reserved exclusively to the "agency itself" under the Administrative Procedure Act Section 11500, et seq. of the Government Code, the board delegates and confers upon the executive officer of the board, or in his or her absence, the designee of the executive officer ~~executive director of the board~~, all functions necessary to the dispatch of business of the board in connection with investigative and administrative proceedings under the jurisdiction of the board~~.~~, including, but not limited to, the ability to approve settlement agreements for the revocation, surrender or interim suspension of a license.

   NOTE: Authority cited: Sections 4933, Business and Professions Code. Reference: Sections 4955 and 4960, Business and Professions Code; and Sections 11500 and 11415.60, Government Code

2. **Revocation for sexual misconduct:** Require an Administrative Law Judge (ALJ) who has issued a decision finding that a licensee engaged in any act of sexual contact with a patient or who has committed or been convicted of sexual misconduct to order revocation which may not be stayed. **Recommendation: Amend regulations/disciplinary guidelines.**

   Proposed language: Amend section 1399.469 to read as follows:

   1399.469. Disciplinary Guidelines.

   In reaching a decision on a disciplinary action under the Administrative Procedures Act (Government Code Section 11400 et seq.), the Acupuncture Board shall consider the disciplinary guidelines entitled "Department of Consumer Affairs, Acupuncture Board 'Disciplinary Guidelines' 1996" which are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the Acupuncture Board in its sole discretion determines that the facts of the particular case warrant such a deviation—for example: the presence of mitigating factors; the age of the case; evidentiary problems.

   Notwithstanding the disciplinary guidelines, any proposed decision issued in accordance with the procedures set forth in Chapter 5 (commencing with Section11500) of Part 1 of Division 3 of Title 2 of the Government Code that

contains any finding of fact that the licensee engaged in any act of sexual contact, as defined in subdivision (c) of Section 729 of the Code, with a patient, or has committed an act or been convicted of a sex offense as defined in Section 44010 of the Education Code, shall contain an order revoking the license. The proposed decision shall not contain an order staying the revocation of the license.

NOTE: Authority cited: Section 4933, Business and Professions Code; and Sections 11400.20, 11400.21, Government Code. Reference: Sections 11400.20, 11400.21 and 11425.50(e), Government Code; Sections 726 and 729, Business and Professions Code; and Section 44010, Education Code.

3. **Denial of application for registered sex offender:** Require the Board to deny a license to an applicant or revoke the license of a licensee who is registered as a sex offender. **Recommendation: Amend regulations/disciplinary guidelines.**

Proposed language: Section 1399.469.1 is added to Article 6 of Division 13.7 to read as follows:

1399.469.1. Required Actions Against Registered Sex Offenders

(a) Except as otherwise provided, if an individual is required to register as a sex offender pursuant to Section 290 of the Penal Code, or the equivalent in another state or territory, or military or federal law, the board shall:

(1) Deny an application by the individual for licensure, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Promptly revoke the license of the individual, in accordance with the procedures set forth in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and shall not stay the revocation nor place the license on probation.

(3) Deny any petition to reinstate or reissue the individual's license.

(b) This section shall not apply to any of the following:

(1) An individual who has been relieved under Section 290.5 of the Penal Code of his or her duty to register as a sex offender, or whose duty to register has otherwise been formally terminated under California law or the law of the jurisdiction that required registration.

(2) An individual who is required to register as a sex offender pursuant to Section 290 of the Penal Code solely because of a misdemeanor conviction under Section 314 of the Penal Code, provided, however, that nothing in this paragraph shall prohibit the board from exercising its discretion to discipline a licensee under any other provision of state law based upon the licensee's conviction under section 314 of the Penal Code.

(3) Any administrative proceeding that is fully adjudicated prior to the effective date of this regulation. A petition for reinstatement of a revoked or surrendered license shall be considered a new proceeding for purposes of this paragraph, and the prohibition in subsection (a) against reinstating a license shall govern.

NOTE: Authority cited: Section 4933, Business and Professions Code. Reference: Sections 4928.1, 4955, 4955.1, 4955.2, 4956, 4960, 4960.2, and 4960.5, Business and Professions Code.

4. **Confidentiality agreements regarding settlements:** Confidentiality agreements regarding settlements can cause delay and thwart a Board's effort to investigate possible cases of misconduct, thereby preventing the Board from performing its most basic function – protection of the public. **Recommendation: Define in regulation that participating in confidentiality agreements regarding settlements is unprofessional conduct. (See (a)(1) and (2).)**

Proposed language: Section 1399.469.2 is added to Article 6 of Division 13.7 to read as follows:

1399.469.2 Unprofessional Conduct.

In addition to the conduct described in Section 4955 of the Business and Professions Code, "unprofessional conduct" also includes but is not limited to the following:

(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's practice to which the licensee is or expects to be named as a party, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the board.

(b) Failure to provide to the board, as directed, lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee is unable to provide the documents within this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee who does not have access to, and control over, medical records.

(c) Failure to cooperate and participate in any board investigation pending against the licensee. This subsection shall not be construed to deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subsection shall not be construed to require a licensee to cooperate with a request that would require the licensee to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's practice. Any exercise by a licensee of any constitutional or statutory privilege shall not be used against the licensee in a regulatory or disciplinary proceeding against the licensee.

(d) Failure to report to the board within 30 days any of the following:

(1) The bringing of an indictment or information charging a felony against the licensee.

(2) The arrest of the licensee.

(3) The conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(e) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Section 4933, Business and Professions Code. Reference: Sections 4928.1 and 4955.

5. **Failure to provide documents and Failure to comply with court order:** Require a licensee to comply with a request for medical records or a court order issued in enforcement of a subpoena for medical records. **Recommendation: Define in regulation that failure to provide documents and noncompliance with a court order is unprofessional conduct. (See (b), (c) and (e).)**

Proposed language: Section 1399.469.2 is added to Article 6 of Division 13.7 to read as follows:

1399.469.2 Unprofessional Conduct.

In addition to the conduct described in Section 4955 of the Business and Professions Code, "unprofessional conduct" also includes but is not limited to the following:

(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's practice to which the licensee is or expects to be named as a party, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the board.

(b) Failure to provide to the board, as directed, lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee is unable to provide the documents within this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee who does not have access to, and control over, medical records.

(c) Failure to cooperate and participate in any board investigation pending against the licensee. This subsection shall not be construed to deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subsection shall not be construed to require a licensee to cooperate with a request that would require the licensee to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's practice. Any exercise by a licensee of any constitutional or statutory privilege shall not be used against the licensee in a regulatory or disciplinary proceeding against the licensee.

(d) Failure to report to the board within 30 days any of the following:

(1) The bringing of an indictment or information charging a felony against the licensee.

(2) The arrest of the licensee.

(3) The conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(e) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Section 4933, Business and Professions Code. Reference: Sections 4928.1 and 4955.

6. **Psychological or medical evaluation of applicant:** Authorize the Board to order an applicant for licensure to be examined by a physician or psychologist if it appears that the applicant may be unable to safely practice the licensed profession due to a physical or mental illness; authorize the Board to deny the application if the applicant refuses to comply with the order; and prohibit the Board from issuing a license until it receives evidence of the applicant's ability to safely practice. **Recommendation: Amend regulations pertaining to applicant requirements that a psychological or medical evaluation may be required.**

Proposed language: Amend section 1399.419 to read as follows:

1399.419. Review and Processing of Exam Applications.

(a) Within forty-five (45) calendar days after receipt of an application for examination, the board shall inform the applicant whether the application is complete and accepted for filing or that it is deficient and what specific information or documentation is required to complete the application.

(b) Within forty-five (45) calendar days of receipt of a completed application, the applicant will be notified as to his/her eligibility for the written examination.

(c) Within thirty (30) calendar days from the date the written examination is administered, candidates will be notified of their results, and if passed, will be offered, upon payment of the specified fee, a license to practice acupuncture.

(d) The minimum, median and maximum processing times for examination results from the time of receipt of a complete application until the board makes a decision is set forth below.

Minimum -- 130 calendar days
Median -- 155 calendar days
Maximum -- 180 calendar days

These processing times apply to those candidates who take and pass the first available examination and who submit a complete application by the first available application deadline.

(e) In addition to any other requirements for licensure, whenever it appears that an applicant for a license may be unable to perform as an acupuncturist safely because the applicant's ability to perform may be impaired due to mental illness, or physical illness affecting competency, the board may

require the applicant to be examined by one or more physicians and surgeons or psychologists designated by the board. The board shall pay the full cost of such examination. An applicant's failure to comply with the requirement shall render his or her application incomplete.

The report of the evaluation shall be made available to the applicant.

NOTE: Authority cited: Section 4933, Business and Professions Code. Reference: Section 4939-15376, Government Code; and Sections 820, 4938 and 4944, Business and Professions Code.

7. **Sexual misconduct:** Currently defined in B&PC § 726. **Recommendation: Define in regulation that sexual misconduct is unprofessional conduct**.

Discuss: Business and Professions Code section 726 is self-executing, which means it is so specific, no implementing or interpreting regulation is necessary to give it effect. That section provides as follows:

"The commission of any act of **sexual** abuse, **misconduct**, or relations with a patient, client, or customer **constitutes unprofessional conduct** and grounds for disciplinary action for any person licensed under this division, under any initiative act referred to in this division and under Chapter 17 (commencing with Section 9000) of Division 3.

This section shall not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relationship."

8. **Failure to provide information or cooperate in an investigation:** Make it unprofessional conduct for a licensee to fail to furnish information in a timely manner or cooperate in a disciplinary investigation. **Recommendation: Define in regulation that failure to provide information or cooperate in an investigation is unprofessional conduct. (See (b) and (c).)**

Add section CCR § 1399.469.2 (Unprofessional Conduct):

Proposed language: Section 1399.469.2 is added to Article 6 of Division 13.7 to read as follows:

1399.469.2 Unprofessional Conduct.

In addition to the conduct described in Section 4955 of the Business and Professions Code, "unprofessional conduct" also includes but is not limited to the following:

(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's practice to which the licensee is or expects to be named as a party, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the board.

(b) Failure to provide to the board, as directed, lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee is unable to provide the documents within this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee who does not have access to, and control over, medical records.

(c) Failure to cooperate and participate in any board investigation pending against the licensee. This subsection shall not be construed to deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subsection shall not be construed to require a licensee to cooperate with a request that would require the licensee to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's practice. Any exercise by a licensee of any constitutional or statutory privilege shall not be used against the licensee in a regulatory or disciplinary proceeding against the licensee.

(d) Failure to report to the board within 30 days any of the following:

(1) The bringing of an indictment or information charging a felony against the licensee.

(2) The arrest of the licensee.

(3) The conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(e) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Section 4933, Business and Professions Code. Reference: Sections 4928.1 and 4955.

9. **Failure to report an arrest, conviction, etc.:** Require a licensee to report to the Board any felony indictment or charge or any felony or misdemeanor conviction. **Recommendation: Define in regulation that failure to report an arrest, conviction, etc. is unprofessional conduct. (See** (d)(1)-(4) and (e).)

Proposed language: Section 1399.469.2 is added to Article 6 of Division 13.7 to read as follows:

1399.469.2 Unprofessional Conduct.

In addition to the conduct described in Section 4955 of the Business and Professions Code, "unprofessional conduct" also includes but is not limited to the following:

(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's practice to which the licensee is or expects to be named as a party, whether the agreement is made before or after the filing of an action:

(1) A provision that prohibits another party to the dispute from contacting, cooperating, or filing a complaint with the board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the board.

(b) Failure to provide to the board, as directed, lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee is unable to provide the documents within this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee who does not have access to, and control over, medical records.

(c) Failure to cooperate and participate in any board investigation pending against the licensee. This subsection shall not be construed to deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subsection shall not be construed to require a licensee to cooperate with a request that would require the licensee to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's practice. Any exercise by a licensee of any constitutional or statutory privilege shall not be used against the licensee in a regulatory or disciplinary proceeding against the licensee.

(d) Failure to report to the board within 30 days any of the following:

(1) The bringing of an indictment or information charging a felony against the licensee.

(2) The arrest of the licensee.

(3) The conviction of the licensee, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.

(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

(e) Failure or refusal to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the board.

NOTE: Authority cited: Section 4933, Business and Professions Code. Reference: Sections 4928.1 and 4955.